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No. 84-711

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

EDWARD RONWIN,

Petitioner,

vs.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA,

Respondent,

SHERMAN D. FOGEL, et al,

Real Parties in Interest.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. Preliminary Comment

It appears that the District Court, Respondent below and herein, did not respond

to the Petition; neither has the Real Party in Interest, the NATIONAL CONFERENCE OF BAR EXAMINERS, ("NCBE"),nor anyone for them. However, the remaining Real Parties in Interest have filed a brief in opposition, as Respondents herein, to which this Reply Brief is addressed.

II. On Respondents Statement of the Case.

Respondents' Statement of the Case needs correction.

Petitioner ("RONWIN") did not complain below of "respondents' use of the Multistate Bar Examination," Respondents' Brief, p. 1; rather, RONWIN complained of the conditions under which said exam was given.

The District Court did not "admonish petitioner for ad hominem attacks made upon counsel for NCBE," Respondents' Brief, p. 2; rather, RONWIN complained that counsel for NCBE ("THORPE") was refusing to cooperate in discovery process; whereupon and with surprise, the District Court argued that

said counsel was justified in not cooperating because RONWIN had accused said counsel of using misrepresentation and deception. Thereupon, RONWIN offered proofs of his accusations; but, the District Court refused any consideration thereof and rendered its verbal order which was later incorporated as part of the Minute Entry of August 3, 1984 (see Appendix,Petition) and to which the Petition takes exception.

On p. 2, Respondents' Brief, examples of the alleged ad hominem attacks are presented in footnote 1. Those phrases accurately describe what THORPE did; not what THORPE is! They are not ad hominem attacks. THORPE's person has never been attacked either in pleadings or in oral argument; and that would have been more obvious if Respondents had reproduced the full, applicable text of the record to which they refer.

The denial of the Petition for Writ of Mandamus by the U.S. Court of Appeals, p. 3,

Respondents' Brief, was not on the merits of the First Amendment question presented herein, but on the basis of Bauman v. U.S., 557 F.2d 650 (9 Cir. 1977). That case dealt with the question of the propriety of the issuance of a writ of mandamus versus settlement of the dispute as part of any appeal.

III. The Petition Does Present a Question Justifying Review By This Court

Respondents claim that RONWIN has made "no showing..that this Court's intervention at this stage of the proceedings is necessary," p. 4, Respondents' Brief. However, Respondents do not respond to RONWIN's position that the District Court's curtailing of First Amendment rights prohibits even erecting a challenge to their alleged defense of quasi-judicial immunity, see pp. 14-16, Petition, and represents a "gross and unlawful interference with RONWIN's right to call a spade a spade, and with RONWIN's right to advocate freely and com-

petently; and in consonance with the Code of Professional Responsibility," pp. 16-17, Petition.

Respondents' allege that the "only effect" of the challenged order is to prohibit one party from "accusing another party of deliberately deceiving the court," p. 4, Respondents' Brief. If a party is, or is believed to be, "deliberately deceiving the court," there is a duty on the part of all other counsel or parties in an action to speak out. That is what RONWIN has done. That is protected by the First Amendment and that is the right, whose exercise no court can curtail or prohibit under the circumstances herein; i.e., where the criticism and charges of misrepresentation and deception are made in non-profane, non-obscene English.

Respondents present the unsupported excuse that "..it is unlikely that [RONWIN's] ability to present factual and legal argu-

ments will be affected by the order prohibiting ad hominem attacks," p. 4, Respondents' Brief. That argument is flawed because (1) the order is not limited to ad hominem attacks; (2) it is unsupported by the record and (3) it ignores the clear evidence that, for example, the order prevents a challenge to the defense of quasi-judicial immunity for some of the Respondents, pp.14-16, Petition.

Contrary to the allegations of Respondents on p. 5, their Brief, the question of general and public importance is: Do counsel and parties have the same First Amendment rights in court as they have out of court?

Respondents assure this Court that the Court of Appeals did not depart from "the accepted and usual course of judicial proceedings" or sanction the District Court's departure from same, p. 5, Respondents' Brief. Precisely the opposite has occurred. The "accepted and usual course of judicial

proceedings" includes meticulous respect for the First Amendment rights of counsel and of parties.

Respondents' view that "the question presented necessarily is limited to the specific facts of this case," p. 5, Respondents' Brief, is not supported by the subsequent arguments, as for example, that "this action had been pending for two years," pp. 5-6, Respondents' Brief; and overlooks the fact that allowing the District Court's assault on the First Amendment to stand provides encouragement for similar attacks by the same and by other federal judges.

While Respondents' argue that the challenged order was necessary to "maintain appropriate dignity and decorum in this particular action," p. 6, Respondents' Brief, they fail to provide record evidence that the "dignity and decorum" was ever disturbed below by RONWIN, or by any other party or counsel. Moreover, to expose deceit and

misrepresentation by counsel is not a violation of the District Court's "dignity and decorum."

The challenged order is not "inextricably linked to the specific arguments advanced below," p.6, Respondents' Brief; rather, it is the principle underlying the challenge that is involved and that reaches to all cases, not just the one below from which this action arises.

One can agree that mandamus is used "to confine an inferior court to a lawful exercise of its prescribed jurisdiction," and that a showing of "exceptional circumstances" justifies use of mandamus, p. 7, Respondents' Brief. That is the point: the objectionable parts of the Minute Entry (Appendix, Petition) is an unlawful assault on the First Amendment outside the District Court's jurisdiction and constitutes the "exceptional circumstance" calling for remedy by mandamus in order to allow the case below to proceed with respect

for the First Amendment rights of parties and counsel.

Respondents seek cover in the allegation that RONWIN's assertions constitute "scandalous material," p. 8, their Brief. It is not scandalous to expose deception and misrepresentation in non-profane, non-obscene English; rather, it is scandalous for an American court to prevent such exposure on penalty of contempt.

Respondents would like the issue before this Court to be "determined upon appeal after final judgment," p. 8, their Brief. That is too late. The challenged order affects the current right to advocacy and thereby the record that can be made on appeal. If THORPE, or any counsel or party, is guilty of deliberate deception and misrepresentation, then that runs to the question of bad faith and clean hands doctrine, in turn, that affects questions, inter alia, of the allowance of attorney's fees. Respon-

dents shy away from facing these questions.

IV. Respondents Fail to Respond to RONWIN's Arguments

RONWIN asserted that he "at no time employed any profanity or obscenity," p. 5, Petition. Respondents fail to contradict.

RONWIN set forth from the record several examples of THORPE's deceptions and misrepresentations, such as item (iii), pp. 7-8 and footnote 2, Petition. Respondents fail to contradict or deny.

RONWIN reproduced the authority of this Court from the text of New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964), which certainly would prohibit the objectionable portion of said Minute Entry, see pp. 5,6,10-13, Petition. Respondents fail to address the holdings in New York Times Co., and its relevancy herein.

RONWIN presented examples of the serious interference with advocacy posed by the challenged order, pp. 13-17, Petition.

Respondents greet RONWIN's argument with silence.

Respondents' response is not a response at all!

V. On the Authorities Cited and Quoted in Respondents' Brief

(a) The attempt to liken the fact situation herein to that in Theriault v. U.S., 481 F.2d 1193 (5 Cir. 1973) is appalling. Unlike the Theriault case and in RONWIN's examples (see item (iii), pp. 7-8, Petition), Respondents set forth terms used in writing by RONWIN, but fail to present the text surrounding those terms, (see footnote 1, p. 2, Respondents' Brief), to prove their alleged contention that the terms,i.e., "deliberate deception","misrepresentation", etc., are not true. In Theriault, the court reproduced the record upon which the two contempt citations rested, 481 F.2d at 1195. Mr. THERIAULT's characterization of the judge clearly used obscenities which led to

the second contempt citation. On the other hand, Mr. THERIAULT described a witness as "..a liar," 481 F.2d at 1195, which led to the first citation for contempt. If the description was accurate, then the contempt citation was an outrage; even if it were not true, it is certainly protected speech, New York Times Co., 376 U.S. at 271, (see p. 6, Petition). But the implied identity to RONWIN's remarks with those in Theriault fades since RONWIN's remarks were aimed at THORPES' deeds, not at THORPE himself; and, THORPE never raised any question about RONWIN's remarks at any time before (or after) the challenged order was promulgated (see p. 5 and item (v), p. 9, Petition).

(b) Not one of the authorities cited and quoted in Respondents' Brief deals with a constitutional question. Herein a major First Amendment question is presented. Respondents fail to acknowledge the important distinction.

VI. An Ironic Turn

After the challenged order was promulgated THORPE filed a "Motion to Strike Portion of Affidavit of Edward Ronwin." In said motion THORPE alleged that parts of an affidavit of RONWIN were "demonstrably false," p. 9, lines 11-14, said motion. Since the challenged language of the Minute Entry was then and still remains in effect, RONWIN had no choice but to file a motion to hold THORPE and NCBE in contempt of the District Court. Said motion was filed after RONWIN filed the Petition herein. THORPE responded as follows to RONWIN's motion, p. 2, lines 8-14, THORPE's Response:

> Upon reflection, use of the words "demonstrably false" may have been too strong. Therefore, NCBE asks leave of the Court to strike them from page 9, line 13 of its memorandum in support of its motion. It requests that the words "not demonstrated" be substituted. It also apologizes to the Court and to Mr. Ronwin for what was overzealous advocacy on the part of its attorney, Philip C. Thorpe.

RONWIN relied, in part, to THORPE's Response as follows, p. 2, lines 1-12:

> RONWIN will not accept the apology of NCBE and THORPE, their Response, p. 2, ls. 12-14, because none is required under the First Amendment, U.S. Constitution.
>
> If NCBE and THORPE believe that part of RONWIN's affidavit is "demonstrably false," then they both have an absolute, constitutional right to say so, and without any requirement for apology, withdrawal or obsequiousness as exhibited in the Response of NCBE and THORPE, p. 2, ls 8-14. They both have a First Amendment right to call RONWIN's affidavit "demonstrably false," in whole or in part, out of court and in court; and, the only proper concern this court has with the description is (1) to determine whether or not the description is true or partially true, and (2) if true, in any degree, then the court's concern is confined to its effect on the issues herein. There, this court's concern constitutionally ends!

Notably, the Respondents to whose Brief this Reply is addressed and who argue that the challenged order is lawful and proper, failed to enter the dispute and urge that their cherished order be applied to THORPE and NCBE, who, as Respondents, are RONWIN's opponents below. In essence, Respondents

really argue that RONWIN should be hindered even by an unconstitutional assault on the First Amendment, but stay silent when their side violates the unconstitutional order; which, ironically, THORPE and NCBE supported with a brief below in response to RONWIN's initial objections.

VII. Lawyers Are First Class Citizens, Too.

While the facts are quite different and allow ample room for opposing views to be comfortably held, the case of Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625 (1967), is applicable herein. Spevack holds that, "..lawyers also enjoy first class citizenship," 385 U.S. at 516. The holding in Spevack which is on point herein is, 385 U.S. at 515:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; [which characterizes Respondents' theme], but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This

> can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. (Bracketted phrase and emphasis added).

CONCLUSION

The District Court has "clearly abused its discretion" by its assault on First Amendment rights to free and unfettered advocacy in American courts, as long as neither profanity nor obscenity besmirch same, which is an "exceptional circumstance" warranting reversal by mandamus, Bankers Life & Casulty Co. v. Holland, 346 U.S. 379, 383, 74 S.Ct. 145, 148 (1953). Wherefore, the Writ sought here should be granted.

Respectfully submitted

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